TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 250.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND WILLIAM MAYGER, APPELLANTS,

vs.

THE MONTANA MINING COMPANY, LIMITED.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 4, 1902.

(18,882.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1903.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
vs.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Transcript of Record.

Appeal from the circuit court of the United States for the district of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Caption.

Be it remembered, that on the 16th day of November, 1893, the plaintiff filed its bill of complaint herein, which is entered of final record, and being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the ninth circuit, district of Montana:

2 The Montana Mining Company, Limited, a corporation organized under and pursuant to an act of the Kingdom of Great Britain, brings this its bill of complaint against The St. Louis Mining and Milling Company of Montana and against William Mayger, defendants. And thereupon your orator complains and says:

I.

That at the dates and times hereinafter mentioned your orator was and now is a corporation duly organized and existing under and by the laws of the Kingdom of Great Britain, and is and was a resident of said kingdom, and that the above-named defendant, The St. Louis Mining and Milling Company of Montana, was at all of said dates and yet is a corporation duly organized and existing by and under the laws of the State of Montana, and that the above-named defendant, William Mayger, was at all of said times and yet is a citizen of said State of Montana, and a resident thereof, and that the complainant and the said defendants are not residents of the same State.

II.

Your orator further complains and says that at the dates and times hereinafter mentioned and for a long time prior thereto, your orator was the owner of, entitled to, and in the actual possession, use, and enjoyment of all and singular that certain quartz lode mining claim situate and being in Ottowa unorganized mining district, in the county of Lewis and Clarke, State of Montana, com-
3 monly known and called the Nine Hour Lode mining claim, the same being more particularly described in the United States patent therefor, as being lot number 63, embracing a portion of township number eleven, north of range six west, in the district and county aforesaid; that as the owner of said lode mining claim your orator is entitled to all veins, lodes, and ledges, within the surface boundaries of the said mining claim and of all metals, ores, quartz and other rock therein contained; that the said mining claim is of great value, to wit, it is of the value of more than ten thousand dollars, and your orator is the owner of said mining claim in fee simple absolute, holding the same under a patent from the United States issued to its predecessors in interest.

III.

Your orator further complains and says, that notwithstanding it is so, the owner of the Nine Hour Lode mining claim, and of all quartz, rock, ore, mineral, gold, silver and other precious metals therein contained, the said defendants have wrongfully and without the consent of your orator, on or about the 10th day of November, 1893, entered upon a portion of the said Nine Hour Lode mining claim by means of a certain tunnel, commonly known as the Transcontinental tunnel, which said tunnel has been started upon the mining claim of the above-named defendant, The St. Louis Mining and Milling Company, of Montana, which adjoins the claim of your said orator on the west; that said tunnel of said defendants was commenced at a point on the said St. Louis Lode mining
4 claim, from which corner No. 2 thereof bears south 26° 7′ east, and distant 541½ feet, and the said tunnel runs thence south 19° 22′ east, 80.83 feet; thence south 13° 6′ east, 81.03 feet;

thence south 18° 4′ east, 70.55 feet; thence south 37° 4′ east, 34.56 feet; thence south 25° 30′ east, 25.24 feet; thence south 24° 38′, 90.40 feet; thence south 21° 27′ east, 37.37 feet; thence south 24° 23′ east, 44.50 feet; thence south 8° 08′ east, 67 feet; thence south 26° 16′ east, 16.09 feet; thence south 76° 26′ east, 12 feet, at which point the said tunnel enters the said Nine Hour Lode mining claim, the property of your orator. And the said defendants have continued the said tunnel on the same course 24 feet further into said mining claim, and they are now engaged in working thereon, and threaten to continue to extend said tunnel into the said mining claim, and to remove therefrom any quartz, rock, or other ore by them encountered in the running of said tunnel, and to appropriate to their own use, any gold, silver or other mineral-bearing quartz rock which they may encounter in the course of said tunnel, and the said defendants threaten to mine and remove ores by means of said tunnel from the said premises so the property of your orator, and so in its possession as aforesaid, to the great injury of your orator, to wit, in its damage in the sum of more than two thousand dollars.

IV.

Your orator further, upon its information and belief, shows and alleges that the said defendants are, and both of them is, insolvent and unable to respond in damages for the injuries committed
5 on your orator's said premises, and those which they are threatening to commit, and that the same constitutes permanent and irreparable injury to said premises.

And your orator has no plain, speedy, and adequate remedy at law, forasmuch as your orator can have no speedy or adequate remedy except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true and perfect answers make, to the matters hereinbefore stated and charged but not under oath an answer under oath being, hereby expressly waived. And your orator further prays that a provisional or preliminary injunction be issued, restraining the said defendants and each and every of them, their agents, and employees, from mining or excavating the said tunnel in the said Nine Hour Lode mining claim, and from removing any quartz rock or other ore, or any rock from said Nine Hour Lode mining claim, through and by means of said tunnel; that upon the final hearing of this case, the said writ of injunction may be made perpetual and the said defendants and each and every of them may be perpetually enjoined and restrained from further running said tunnel into the said Nine Hour Lode mining claim, or from mining any quartz or other ore, or any rock from said Nine Hour Lode mining claim, by means of said tunnel.

Your orator further prays your honors to grant unto your
6 orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of

America directed to the said St. Louis Mining and Milling Company of Montana, and to the said William Mayger, commanding them on a day certain to appear and to answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court may seem proper, and required by the principles of equity and good conscience.

MONTANA MINING COMPANY, LIMITED,
By C. W. GOODALE, *Supt.*

CULLEN & TOOLE,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Montana, } ss:

C. W. Goodale, being first duly sworn, says: The above-named plaintiff is a corporation and I am an officer thereof, to wit: I am its superintendent and in charge of its business at Marysville, Montana; I have read the foregoing complaint and know the contents thereof, and the facts therein stated are true except as to such matters as are therein stated upon information and belief, and as to such matters I believe it to be true.

C. W. GOODALE.

Subscribed and sworn to before me this 16th day of November, A. D. 1893.

[SEAL.] W. E. CULLEN,
Notary Public.

Title of court and cause. Complaint. In equity. Filed Nov. 16th, 1893. Geo. W. Sproule, clerk.

7 And thereafter, to wit, on the 16th day of November, 1893, a subpœna in equity was issued herein, which is entered of final record herein, and is as follows, to wit:

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

The President of the United States of America, Greeting, to St. Louis Mining and Milling Company of Montana and William Mayger, defendants:

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the courtroom in Helena, on the first day of January, A. D. 1894, to answer a bill of complaint

exhibited against you in said court by Montana Mining Company, Limited, complainant, who is a citizen of the Kingdom of Great Britain, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of our Independence the 118th.

[SEAL.] GEO. W. SPROULE, *Clerk.*

8 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of January next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF MONTANA.

I hereby certify, that I received the within writ on the 16th day of November, 1893, and personally served the same on the 16th day of November, 1893, on the St. Louis Mining and Milling Company of Montana, by delivering to and leaving with William Mayger, the general manager of the said defendant corporation, and on William Mayger, personally, said defendant, named therein personally, at Marysville in the county of Lewis and Clarke, in said district, a copy thereof, together with a copy of the complaint certified to by George W. Sproule, clerk of the circuit court of the United States.

Helena, Nov. 17, 1893.

W. F. FURAY,
United States Marshal,
By R. H. BECKWITH, *Deputy.*

(Endorsed:) No. 303. United States circuit court, ninth circuit, district of Montana. In equity. Montana Mng. Co. Ltd., *vs.* St. Louis M. & M. Co. *et al.* Subpœna. Filed Nov. 17, 1893. Geo. W. Sproule, clerk.

9 And thereafter, to wit, on the 21st day of November, 1898, the amended and supplemental answer of the defendants was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Amended and Supplemental Answer.

Now come the defendants, and for amended and supplemental answer to the complaint of the plaintiff:

I.

Admit that at the dates mentioned in said plaintiff's complaint, the plaintiff corporation was the owner of, in possession, and entitled to the possession of what is known and described in said complaint as the Nine Hour Lode mining claim, as described and set forth in the United States patent therefor, and that since the commencement of this action the plaintiff-corporation became, and now is, the
10 owner of what is known and designated as the thirty-foot strip or compromise ground as a part and portion of the said Nine Hour Lode claim, but deny that it was or is engaged in working, or threatens to continue to work, or extend said tunnel into the said mining claim of plaintiff for the purpose or with the intention of removing therefrom quartz, rock, or ore-bearing gold, silver, or other valuable metals, or that they threaten to take from said tunnel any quartz, rock or ore of any value whatever, or that they intend or threaten to convert any such quartz, rock, or ore to their own use and benefit, belonging to the said plaintiff, or to which it is entitled, or out of or from any vein, lode, or ledge having the top or apex thereof inside of the said Nine Hour Quartz Lode mining claim, so described as aforesaid, and aver that the said tunnel at the time of the institution of this action and the issuance of the provisional or temporary restraining order therein was being worked and prosecuted through barren country rock which contained and contains no minerals of any value whatever, and that the prosecution of the work upon said tunnel was for the sole purpose and intention of intersecting and tapping a certain vein, lode, or ledge having its top or apex inside the boundary lines of the St. Louis Lode mining claim, to which the said St. Louis Mining and Milling Company of Montana have and held the United States patent title, and which said vein, lode, or ledge apexes within the planes designated in the petition and motion of these defendants for a modification of the injunction herein, and included in the report of the master to whom was referred the questions presented by the
11 said motion and petition; and aver that these defendants have at all times during the dates aforesaid been in the actual

possession and occupation of the said St. Louis Lode mining claim, and of all veins, lodes, or ledges having their top or apex within the surface boundaries of the same, and are entitled to work and mine all such veins, lodes, or ledges, and that the said defendant company is now in the possession of the same and entitled to the possession thereof, and of all the quartz and minerals contained in said veins, lodes, or ledges so having their top or apex within the said St. Louis Lode mining claim as aforesaid.

II.

Defendants deny that they are insolvent and unable to respond for any damages that the said plaintiff has or may sustain by reason of the said wrongs set forth in their said complaint, or any threatened or continuous trespass therein set forth.

Defendants for further answer to the complaint of the plaintiffs aver:

That at and long before the alleged wrongful acts of these defendants the said St. Louis Mining and Milling Company of Montana was, and is now, the owner of the St. Louis Quartz Lode mining claim, which is situated in the Ottawa mining district, in the county of Lewis and Clarke, and State of Montana, and more particularly described as follows, to wit:

Beginning for the description of lots No. 54 and 55 A at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54,
12 a mound of stones alongside, from which the quarter section corner on south boundary of section 36, in township 12 north, of range 6 west, of the principal meridian bears south 74 degrees and 15 minutes east, 353 feet distant; thence, first course, magnetic variation nineteen degrees east, south 21 degrees and 15 minutes west, one hundred and two feet, intersect line between townships 11 and 12 north, of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55 A, four hundred and fifty feet to a point from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 x 5 feet, one hundred feet long, runs south 54 degrees east, six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant, ten hundred and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55 A, a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west, two hundred and eighty-nine feet distant; thence, second course, magnetic variation nineteen degrees east, south 51 degrees 30 minutes west, four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches marked 3 M. C. 55 A, a mound of stones alongside, from which the southeast location corner bears south 10 degrees east, four hundred and thirty-five feet distant; thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55 A; a mound of stones alongside, from which the southwest location

corner bears south 79 degrees west one hundred and eighty-
13 two feet distant; thence, fourth course, magnetic variation 19 degrees east, north fifty-one degrees 15 minutes east, four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5 M. C. 55 A, a mound of stone alongside; thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, five hundred and twenty-nine and seven-tenths feet distant, intersects said township line, a granite stone 18 x 14 x 7 inches, marked 54 A, 54 M. C., ten hundred and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6 M. C. 54 A, from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east, twenty-four feet distant, and a pine tree 5 inches in diameter marked 6 M. C. 54 B. T., bears south fifty-four degrees east, twenty-one and five-tenths feet distant; thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east, five hundred and fifteen and five-tenths feet to corner No. 1, of lot No. 40, the Drumlurmon Lode claim, five hundred seventy-nine feet to corner No. 1, the place of beginning, said lot- Nos. 54 and 55 A extending fifteen hundred feet in length along said St. Louis vein or lode—the granted premises in said lots contain eighteen acres and ninety-three hundredths of an acre.

Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to wit:

14 Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-eight minutes west along said boundary between corners 1 and 2, sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes, west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the boundary line of the said St. Louis lode between corners 3 and 4, thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

And said defendant was in the actual possession and occupation thereof, as well as what is designated in said plaintiff's complaint as the Transcontinental tunnel, save and except that portion of the St. Louis Lode mining claim so described as aforesaid, which is em-

braced in what is known as the thirty-foot strip or compromise ground, which, as defendants are informed and believe, has
15 by the Supreme Court of the United States been adjudged to be a part and portion of the said Nine Hour Lode mining claim.

And these defendants further aver that they were at the time of the issuance of the provisional injunction herein prosecuting and extending said tunnel for the purposes of tapping and intersecting a certain vein, lode, or ledge having its top or apex inside the patented premises of the said defendant company, and outside of the said thirty-foot strip or compromise ground, and that the said tunnel is useful and necessary in and about working that portion of the said vein, lode or ledge so having its top or apex inside the boundary lines of the said St. Louis Lode mining claim described as aforesaid.

That the top or apex of the said vein, lode, or ledge so having its dip and apex inside of the St. Louis Lode mining claim as developed and disclosed, intersects and passes through the west boundary line of the said St. Louis Lode mining claim at the points described by perpendicular planes, as follows, to wit:

Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward whereat it passes through the hanging wall of said vein, lode or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears north 12 degrees, 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise at said projected parallel end line, five feet west
16 of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees, 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim between corners 1 and 2, with the west line of the said thirty foot strip hereinbefore described; thence south fifty degrees, fifty minutes west, 108 feet and along the west line of the said thirty foot strip, to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty foot strip. All of which will more fully appear, reference being had to a plat and map thereof hereto attached, and made a part of this answer, marked Exhibit "A," and to which reference is made.

And these defendants further aver that the said vein, lead, or lode so having its top or apex within the vertical planes aforesaid dips to the east and under and beneath the surface location of the said Nine Hour Lode claim, including the fractional portion thereof so known and designated as the thirty foot strip or compromise ground, and that the continuation of the said tunnel for the purposes afore-

said constitutes the wrongs and grievances complained of by the said plaintiff.

And these defendants for further supplemental answer show unto this honorable court that on the 7th day of June, 1898, the
17 defendant, by petition and motion applied to this honorable court for a modification of the injunction herein, which said application and motion have been referred to the master in chancery, who has reported upon the same, and, as these defendants verily believe, and therefore aver, the only question to be determined is whether or not the said defendants as matter of law, are entitled to prosecute the said tunnel and intersect and tap the said vein so having its top or apex within the planes aforesaid.

Wherefore, defendants having fully answered, ask that the said plaintiff's bill of complaint be dismissed; that the temporary or provisional restraining order herein be set aside and dissolved; and that the defendants have and recover their costs and disbursements in this behalf expended.

E. W. TOOLE AND
THOS. C. BACH,
Of Counsel and Solicitors for Defendants.

UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, } ss:

On this twenty-first day of November, A. D. 1896, personally appeared before me, Harry Harris, a notary public in and for said county and State, William Mayger, general manager and superintendent of The St. Louis Mining and Milling Company of Montana, one of the defendants herein, who being by me duly sworn,
18 deposes and says: That he is an officer, to wit, the general manager and superintendent of said company and familiar with its business; that he has read the foregoing answer and knows the contents thereof; and that the same is true to his best knowledge, information and belief.

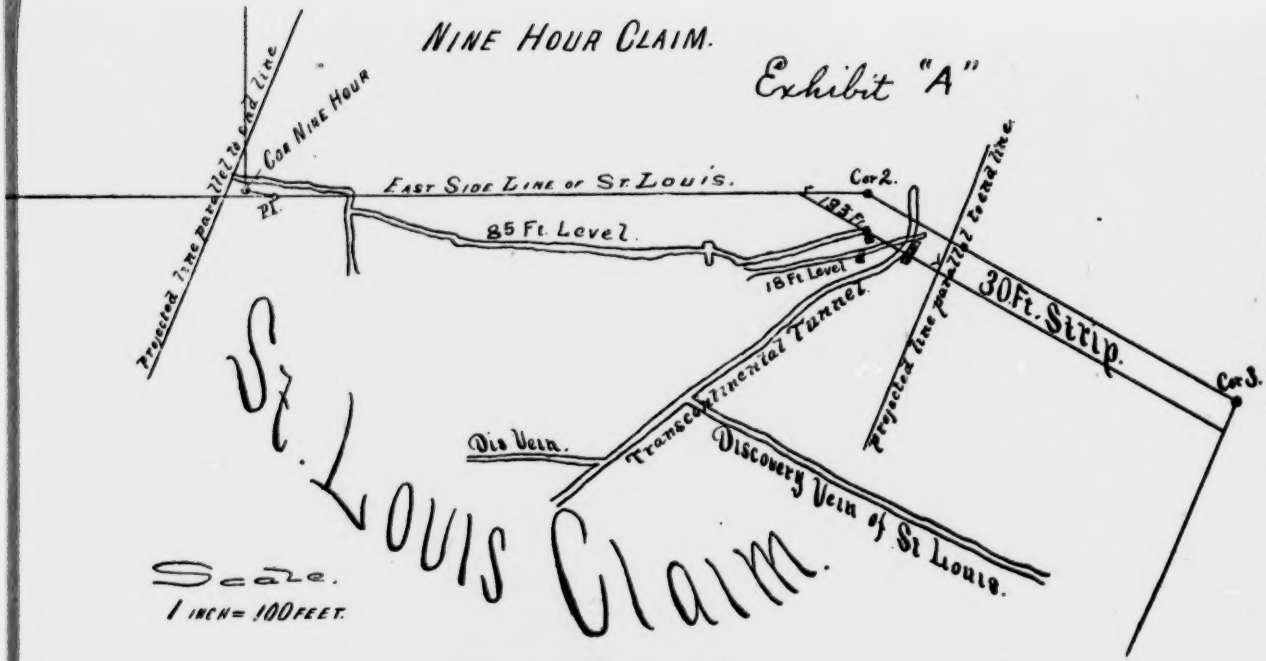
WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-first day of November, A. D. 1898.

[SEAL.]

HARRY HARRIS,
Notary Public in and for said County and State.

(Here follows diagram marked p. 19.)



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v.
Montana M. Co.

vs. The Montana Min. Co., Limited. 19

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20 (Endorsed:) Title of court and cause. Answer. Filed Nov. 21, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 26th day of November, 1898, the replication of complainant was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Replication.

Replication of plaintiff in the above-entitled cause to the amended and supplemental answer of the defendants, The St. Louis Mining and Milling Company of Montana and William Mayger.

This replicant, saving and reserving all advantage of exception to the manifold insufficiencies in said answer, for replication thereto saith that it will aver and prove its said bill to be true and
21 sufficient, and that said answer is untrue and insufficient; wherefore it prays relief as in said bill set forth.

Dated Nov. 26, 1898.

CULLEN, DAY & CULLEN,
Solicitors for Complainant.

Replication. Filed Nov. 26, 1898. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 21st day of June, 1899, a stipulation was filed herein, which is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants. } No. —.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated between the above-named parties that this case may be submitted to the court for its judgment upon the follow-

ing agreed statement of facts, which shall be taken and deemed
22 to be the evidence in the case in all respects as if the same were found as the facts by the master in chancery and adopted by the court.

I.

The above-named plaintiff is, and was at all the times mentioned in the pleadings herein, the owner of, in possession, and entitled to the possession of that certain mining claim described in its said complaint as the Nine Hour Lode mining claim, holding the same under a patent therefor from the United States upon a location made under the United States mining acts of 1872 and acts amendatory thereto; that the said Nine Hour Lode mining claim contains valuable deposits of gold, silver and other metals and the said plaintiff has been and is yet engaged in working and mining thereon, and that the value of said mining claim is largely in excess of two thousand dollars.

II.

That the above-named defendant, The St. Louis Mining and Milling Company of Montana, is, and at all the times mentioned in the pleadings herein was, the owner of the St. Louis Lode mining claim, in possession and entitled to the possession thereof, holding the same under a United States patent therefor upon a location made under the United States mining laws of 1872 and acts amendatory thereto. The St. Louis mining claim lies west of and adjoining the Nine Hour claim first herein mentioned, and its value is largely in excess of $2,000.

23 III.

That the said defendants at the time of service upon them of the restraining order in the above-entitled action were engaged in running and drifting a cross-cut tunnel, known as the Transcontinental tunnel, starting within the surface boundaries of the St. Louis claim, and running thence easterly through the said St. Louis claim to the westerly boundary line of the said Nine Hour claim, and thence continuing in a straight line fifteen feet further, and under the surface ground of the said Nine Hour claim, at a depth of about 260 feet; that the said tunnel was run horizontally through country rock and was so run without the consent of the said plaintiff and against its will and without the said defendants, or either of them having obtained from the plaintiff, any right of way for said tunnel beyond the easterly boundary line of the St. Louis claim.

IV.

That the said St. Louis mining claim is a patented mining claim and its location is prior to that of the said Nine Hour claim. That the discovery vein of the said St. Louis claim runs parallel with its

side lines, and one end thereof passes through its south end line, and the other end thereof passes through the other end line, and said vein dips toward the east.

V.

That a vein in its full width of gold-bearing quartz other
24 than said discovery vein wholly enters the easterly side line of said St. Louis claim at a point on said line about 480 feet south from the northeast corner of said claim, and thence runs in a southerly direction and with its apex entirely within the surface of said St. Louis claim until it passes out of the said claim through the said side line and into the Nine Hour claim at a point about 350 feet northerly from the southeasterly corner of said St. Louis claim. The dip of this vein is also to the east, the portion thereof the apex of which is within the surface ground of the St. Louis claim passes on its dip beyond the easterly side line of said claim and under the surface of the said Nine Hour claim.

The tunnel above referred to starts at a point on the St. Louis claim westerly of the strike of said last-mentioned vein and at a point about midway between the point at which said vein enters the surface of the St. Louis claim and the points at which it departs therefrom, and runs toward the said vein, and if extended will intersect said vein at a point thereon which is between perpendicular planes passed through the end lines of the St. Louis claim (which are parallel) and is also between perpendicular planes parallel to the above-mentioned planes passed through the two points at which said vein intersects the east side of said St. Louis claim and will not intersect any other vein or lode, before the intersection of the vein above referred to, and that the defendant will not extend said tunnel beyond the point at which it will intersect said vein
which apexes within the St. Louis claim as above mentioned,
25 but proposes and intends to use said cross-cut tunnel in working and mining said vein within the vertical planes last aforesaid on its dip to the full extent of the depth thereof, which constitutes the alleged trespass threatened and intended by said defendants.

VI.

This stipulation is not intended to, nor shall it in any manner affect the rights of either party, or any of the parties, to any damage or injury they or any of them may sustain or may have sustained on account of any trespass upon said lode claims or any conversion of any quartz rock or ore taken therefrom, and is not intended and shall not limit the rights of either party under the law to any claim for damages but said stipulation is intended to be and is limited to the question of the right to an injunction within the planes aforesaid, on account of the extension of said cross-cut tunnel; and this stipulation shall not be considered as evidence of any

fact herein stipulated in any other action now pending or which may hereafter be commenced between the parties hereto.

CULLEN, DAY & CULLEN,
Attorneys for Plaintiff.
E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Defendant.

(Endorsed:) Title of court and cause. Stipulation. Filed June 21, 1899. Geo. W. Sproule, clerk.

26 And thereafter, to wit, on the 3d day of December, 1900, an order was duly made adopting agreed statement of facts, which said order is entered of final record and is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Complainant,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND WILLIAM MAYGER, Defendants.

Order Adopting Agreed Statement of Facts.

This cause having been submitted to the court upon an agreed statement of facts—

It is hereby ordered that the same be adopted, and the same is hereby adopted, by the court, as the findings of the facts involved in this cause, and the court bases its decree thereon.

Helena, Montana, December 3d, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Order. Filed and entered Dec. 3d, 1900. Geo. W. Sproule, clerk.

27 And thereafter, to wit, on the 3d day of December, 1900, a final decree was duly filed and entered herein, which is entered of final record and being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Complainant,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Defendants.

No. 303. Perpetual Injunction.

Final Decree.

This cause coming on to be heard at this term of court upon the bill of complaint, the answer and the replication, and upon an agreed statement of facts, the cause having been submitted to the court upon the said pleadings, and statement without further evidence, and the court having adopted the said agreed statement of facts, and having made the same the findings of fact by the court and the judge thereof, and the same having been argued by counsel; thereupon, upon consideration thereof—

28 It is ordered, adjudged, and decreed as follows: That you, the said defendants, and each of you, your agents, servants, and employees, are forever perpetually forbidden and restrained from further prosecuting work on your Transcontinental tunnel in said bill of complaint herein more particularly set forth and described, beneath the surface of the Nine Hour Lode mining claim of the said complainant, and from mining and removing any quartz, rock, or ore belonging to said mining claim by means of said tunnel or from extending your said tunnel further into said mining claim.

Dated Helena, Montana, this 3d day of December, 1900.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Final decree. Filed and entered Dec. 3d, 1900. Geo. W. Sproule, clerk.

Enrollment.

Whereupon, said pleadings, process, orders, and final decree are entered of final record in accordance with law and the practice of this court.

Attest my hand and the seal of said court at Helena, Montana, this 3d day of December, A. D. 1900.

GEO. W. SPROULE, *Clerk.*

Filed December 3d, 1900.

GEO. W. SPROULE, *Clerk.*

29 And thereafter, to wit, on the 29th day of May, 1901, the defendant herein filed its assignment of errors, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Assignment of Errors.

And now, on this 29th day of May, 1901, come the defendants in the above-entitled cause, by E. W. Toole and Thomas C. Bach, their solicitors, and say that the decree in said cause is erroneous and against the just rights of said defendants, for the following reasons:

First. Because it appears from the agreed statement of facts upon which said decree was rendered that the tunnel upon which these defendants are by said decree enjoined from further prosecuting any work was being driven for the purpose of intersecting a por-
30 tion of a vein of gold-bearing quartz which belongs to the defendant, St. Louis Mining and Milling Company of Montana.

Second. Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these defendants, will intersect the said portion of said vein at a point therein which belongs to the said St. Louis Mining and Milling Company of Montana.

Third. Because it appears from said agreed statement that said tunnel, if extended in the manner as intended by said defendants and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the defendant, St. Louis Mining and Milling Company of Montana.

Fourth. Because it appears from said agreed statement of facts that the defendants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein, which belongs to the said St. Louis Mining and Milling Company.

Fifth. Because it appears from said agreed statement of facts that the defendants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

Sixth. Because it appears from the agreed statement of facts herein, and upon which said decree was rendered and entered, that the only trespass which the defendants threaten or intend is the driving of an underground cross-cut tunnel which commenced under the surface of the property belonging to the defendant, St.
31 Louis Mining and Milling Company of Montana, and which tunnel defendants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana,

and is underneath the surface ground belonging to the plaintiff, and which said tunnel said defendants will not extend beyond the point of which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of Montana; and which said tunnel so extended will not intersect any other vein than that referred to, and which said tunnel the said defendants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company of Montana, as appears from the said statement of facts.

Seventh. Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in plaintiff's grant under its patent, and that said tunnel will in no manner interfere with the surface of any vein, lode, or ledge included within said patent, and for that no injury, irreparable or otherwise, will be sustained by said plaintiff.

Therefore, the said defendants pray that the said decree be reversed, and that the said court may be directed to enter a decree dismissing the bill of complaint herein.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for Defendants.

32 (Endorsed:) Title of court and cause. Assignment of errors. Filed and entered May 29, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 29th day of May, 1901, the defendant filed its petition for allowance of appeal herein, which said petition, together with the allowance of said appeal, is in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Defendants.

Petition for Appeal and Order Allowing Same.

To the Honorable Hiram Knowles, district judge, and one of the judges of the above-named court, presiding therein:

The above-named defendants, The St. Louis Mining and Milling Company of Montana and William Mayger, conceiving themselves aggrieved by the decree made and entered on the 3d day of December 1900, in the above-entitled cause, do hereby appeal from said decree to the United States circuit court of appeals

33

of the ninth circuit, for the reasons specified in the assignments of errors which is filed herewith; and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent to the United States court of appeals for the ninth circuit.

Dated this 29th day of May, 1901.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for the Defendants.

The foregoing claim of appeal is allowed, and the bond on appeal is fixed at the sum of three hundred dollars ($300).

Done in open court, this 29th day of May, 1901.

HIRAM KNOWLES,
District Judge and One of the Judges of said Court, Presiding Therein, and by Whom said Order and Decree was Signed.

(Endorsed:) Title of court and cause. Petition for appeal and order. Filed and entered May 29th, 1901. Geo. W. Sproule, clerk.

34 And thereafter to wit, on the 29th day of May, 1901, a bond on appeal was filed and duly approved herein, which said bond is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Defendants.

Bond on Appeal.

Know all men by these presents, that we, The St. Louis Mining and Milling Company of Montana, a corporation organized and doing business under and by virtue of the laws of the State of Montana, and William Mayger of Marysville, Montana, the defendants in the above-entitled action, as principals, and the United States Fidelity and Guaranty Company, a corporation, are held and

35 firmly bound unto the above-named plaintiff, The Montana Mining Company, Limited, in the full and just sum of three hundred dollars ($300.00), to be paid to the said plaintiff, The Montana Mining Company, Limited, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the circuit court of the United States for the ninth circuit, district of Montana, in a suit depending in said court, between The Montana Mining Company, Limited, plaintiff, and The St. Louis Mining and Milling Company of Montana, and William Mayger, defendants, a decree was rendered against said St. Louis Mining and Milling Company and William Mayger, and the said St. Louis Mining and Milling Company and William Mayger, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and a citation directed to the said Montana Mining Company, Limited, citing and admonishing it to be and appear at a session of the United States court of appeals for the ninth circuit, to be holden at the city of San Francisco, California, in the said circuit, thirty days from date hereof.

36 Now, the condition of the above obligation is such that if the said St. Louis Mining and Milling Company of Montana and William Mayger shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said plea good, then the above obligation to be void; otherwise to be in full force and virtue.

WM. MAYGER.
ST. LOUIS MINING AND MILLING CO. OF MONTANA,
By WM. MAYGER, *M'ng'r.* [SEAL.]
[SEAL.] UNITED STATE. FIDELITY & GUARANTY CO.,
By GEO. L. RAMSEY,
Its Attorney in Fact.

Signed, sealed, and delivered in the presence of:
THOS. C. BACH.

Approved by:
HIRAM KNOWLES, *Judge.*

May 29, 1901.

(Endorsed:) Title of court and cause. Bond on appeal. Filed and entered, May 29, 1901. Geo. W. Sproule, clerk.

37 And thereafter, to wit, on said 29th day of May, 1901, a citation was duly issued, served, and filed herein, which said citation is as follows:

Citation.

UNITED STATES OF AMERICA, *District of Montana*, } ss:

The President of the United States of America to the Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the ninth circuit, at the city of San Francisco, in the State of California, on the 28th day of June, A. D. 1901, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, ninth circuit, district of Montana, wherein The St. Louis Mining and Milling Company of Montana and William Mayger are the defendants and appellants, and you are the complainant and respondent, to show cause, if any there be, why the decree entered in this case against the above-named defendants on the 3d day of December, A. D. 1900, by the Honorable Hiram Knowles, United States district judge, for the district of Montana, as in the petition of the defendants on appeal herein mentioned, should not be reversed, set aside, and annulled, and why speedy justice should not be done to the parties in this behalf.

38 Witness, the Honorable Hiram Knowles, United States district judge for the district of Montana, at Helena, Montana, this 29th day of May, A. D. 1901.

[SEAL.] HIRAM KNOWLES,
United States District Judge for the District of Montana.

We hereby, this 29th day of May, 1901, accept due personal service of this citation on behalf of The Montana Mining Company, Limited, complainant and appellee.

CULLEN, DAY & CULLEN,
Solicitors and of Counsel for Appellees.

Filed and entered May 29, 1901.

GEO. W. SPROULE, *Clerk.*

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, *District of Montana*, } ss:

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 37 pages, numbered consecutively from 1 to 37, is a true and correct transcript of the plead-

ings, process, orders, decree and all proceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

39 I further certify that the costs of the transcript of record amounts to the sum of twenty-five and 75–100 dollars ($25.75), and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States circuit court for the district of Montana, at Helena, Montana, this 20th day of June, A. D. 1901.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 714. In the United States circuit court of appeals for the ninth circuit. The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, *vs.* The Montana Mining Company, Limited, appellee. Transcript of record. Appeal from the circuit court of the United States for the district of Montana. Filed June 25, 1901. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

40 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Thursday the seventeenth day of October in the year of our Lord one thousand, nine hundred and one.

Present: The Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable William W. Morrow, circuit judge.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee. } No. 714.

Order of Submission.

This cause coming on regularly for hearing this day and there being no appearance of counsel on behalf of the respective parties,

Ordered appeal submitted to the court for consideration and decision on briefs.

41 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Appeal from the United States circuit court for the district of Montana.

Toole & Bach for the appellants. W. E. Cullen, E. C. Day and W. E. Cullen, Jr., for the appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, circuit judge, delivered the opinion of the court:

The St. Louis Mining and Milling Company is the owner of the St. Louis Lode mining claim and The Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour Lode mining claim which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward and into the Nine Hour claim for the purpose of reaching and mining a lode which had its apex in the St. Louis claim and which they had the right to pursue on its downward course as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the
42 St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode or ledge. At the suit of the owner of the Nine Hour claim the circuit court enjoined the appellants from proceeding further with said tunnel, from that decree the present appeal is taken.

The case involves the interesting question, whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim, is confined in his right to operations within or upon the vein itself and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants in this instance have the right to explore within the Nine Hour claim and thereby to reach their own property so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute, section 2322, and the patent there-

upon issued, confers upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations," and that the statute further specifies that such locators, notwithstanding their extra-lateral rights, shall have no authority to
43 enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim except the veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extra-lateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims so as to confer extra-lateral rights. This is their right and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws as we construe them grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute, section 2319, declares "the lands" in which valuable mineral deposits are found, to be open to occupation and purchase, and section 2325 provides that "A patent for any land claimed and located for valuable deposits may be obtained in the following manner:" These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common law ownership. The reason for specifying in the
44 description of the grant the "veins, lodes and ledges," is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Parrot Silver & Copper Co. *v.* Heinze *et al.*, 64 Pac. Rep. 326, the supreme court of Montana held in substance that the owner of a mining claim is *prima facie* the owner of a vein or lode found at a

depth of 1300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: "Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant." Of similar import is State *v.* District Court, 65 Pac. Rep. 1020. In Doe *v.* Mining Co., 54 Fed. 935, Judge Ross said: "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common-law." In Consolidated Wyoming G. M. Co. *v.* Champion Min. Co., 63 Fed. 540, Judge Hawley said: Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which
45 has its apex within your surface claim." We find no error in the decree of the circuit court. The decree is affirmed.

(Endorsed:) Opinion. Filed March 10, 1902, F. D. Monckton, clerk.

46 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and WILLIAM MAYGER, Appellants,
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee.
} No. 714.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered Mar. 10, 1902, F. D. Monckton, clerk.

47 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellant and Defendant,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent and Plaintiff.

Petition for Appeal.

The above named appellants (and defendants in the circuit court), The St. Louis Mining and Milling Company of Montana and William Mayger, conceiving themselves aggrieved by the judgment and decree made and entered on the 10th day of March, 1902, in the above entitled cause, in the above entitled court, and affirming the decree of the circuit court, do hereby appeal from said judgment and decree of affirmance to the Supreme Court of the United States, for the reasons specified in the assignments of errors which is filed herewith; and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

Dated this 25th day of February, A. D. 1903.

E. W. TOOLE &
T. C. BACH,
Solicitors for said Appellants.

(Endorsed:) Petition for appeal to Supreme Court U. S. Filed March 2, 1903. F. D. Monckton, clerk.

48 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

Assignment of Errors.

And now, on this 25th day of February, A. D. 1903, came the appellants in the above entitled cause (defendants in the circuit court) by E. W. Toole and Thomas C. Bach, their solicitors, and say: That the judgment of the said court of appeals, affirming the decree of the circuit court in said cause, is erroneous and against the just rights of said defendants, the appellants in the above entitled cause, for the following reasons:

First. Because it appears from the agreed statement of facts, upon which said judgment and decree were rendered, that the tunnel upon which these appellants are, by said decree, so affirmed by the United States circuit court of appeals, enjoined from further prosecuting any work, was being driven for the purpose of intersecting a portion of a vein of gold bearing quartz which belongs to the appellant, St. Louis Mining and Milling Company of Montana.

Second. Because it appears from said agreed statement that the said tunnel if extended in the manner intended by these appellants, will intersect the said portion of said vein, at a point therein
49 which belongs to the said St. Louis Mining and Milling Company of Montana.

Third. Because it appears from the said agreed statement that said tunnel, if extended in the manner intended by said appellants, and set forth in said statement, will not intersect any other vein or lode before it intersects that portion of the vein above referred to, and which is the property of the appellant, St. Louis Mining and Milling Company of Montana.

Fourth. Because it appears from said agreed statement of facts that the appellants will not extend said tunnel beyond the point at which it will intersect that portion of the said vein, which belongs to the said St. Louis Mining and Milling Company.

Fifth. Because it appears from said agreed statement of facts that the appellants intend to use said tunnel only in working and mining that portion of the vein mentioned in the pleadings and in said statement, which is the property of the said St. Louis Mining and Milling Company.

Sixth. Because it appears from the agreed statement of facts herein, and upon which said judgment and decree was rendered and entered, that the only trespass which it is asserted or claimed the defendants in the circuit court (appellants herein) intend or threaten, is the driving of an underground cross cut, which commenced under the surface of the property belonging to the appellant, St. Louis Mining and Milling Company, of Montana, and which tunnel appellants intend to continue until it shall intersect a portion of a vein of gold-bearing quartz, which portion of said vein belongs to the St. Louis Mining and Milling Company of Montana, and is underneath the surface ground belonging to the respondent, and which said tunnel said appellants will not extend beyond the point of which it will intersect that portion of the vein referred to, which belongs to the St. Louis Mining and Milling Company of
50 Montana; and which said tunnel, so extended will not intersect any other vein than that referred to, which said tunnel the said appellants intend and propose to use in working that portion of the vein referred to, and which belongs to the said St. Louis Mining and Milling Company, of Montana, as appears from the said statement of facts.

Seventh. Because it appears that said tunnel is being extended and will be extended through what is known as the country rock, not included in respondent's grant under its patent, and that said

tunnel will in no manner interfere with the surface or any vein, lode or ledge included within said patent, and for that no injury, irreparable or otherwise will be sustained by said respondent.

Therefore, the said appellants pray that the said judgment and decree be reversed, and that the said circuit court of appeals be directed to reverse its said judgment.

E. W. TOOLE AND
THOS. C. BACH,
Solicitors for Appellants.

(Endorsed:) Assignment of errors. Filed March 2, 1903, F. D. Monckton, clerk.

51 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

This 2nd day of March, 1903, came the appellants herein, by their attorneys, and filed herein and presented to the court their petition, praying for the allowance of an appeal, intended to be urged by them, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal, and approve the bond on file herein.

WM. B. GILBERT,
U. S. Circuit Judge.

(Endorsed:) Order allowing appeal to Supreme Court U. S. Filed March 2, 1903, F. D. Monckton, clerk.

52 In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and William Mayger, Appellants,
vs.
MONTANA MINING COMPANY, LIMITED, Respondent.

Bond on Appeal.

Know all men by these presents, that we, the St. Louis Mining and Milling Company of Montana, a corporation organized and

doing business under and by virtue of the laws of the State of Montana, and William Mayger of Marysville, Montana, the appellants in the above entitled action, as principals, and the United States Fidelity and Guaranty Company, a corporation, are held and firmly found unto the above-named respondent, The Montana Mining Company, Limited, in the full and just sum of five hundred dollars ($500.00) to be paid to the said respondent, The Montana Mining Company, Limited, its successors and assigns, to which payment, well and truly to be made, we bind ourselves jointly and severally, by these presents.

Sealed with our seals and dated this 25 day of February, A. D. 1903.

53 Whereas, lately in the United States circuit court of appeals for the ninth judicial circuit, in a suit pending in said court, between The Montana Mining Company, Limited, respondent and The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, a judgment was rendered, affirming the decree of the circuit court, which decree was rendered against the said St. Louis Mining and Milling Company and William Mayger, and the said St. Louis Mining and Milling Company of Montana and William Mayger, having obtained an appeal and filed a copy thereof in the clerk's office of said court, to reverse the judgment affirming said decree in the aforesaid suit, and a citation directed to the said Montana Mining Company, Limited, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C. 60 days from the date hereof;

Now the condition of the above obligation is such that if the said St. Louis Mining and Milling Company of Montana and William Mayger shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said plea good, then the above obligation to be void; otherwise to be in full force and virtue.

Dated: February 25, 1903.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
By WILLIAM MAYGER, *Manager.*
WILLIAM MAYGER.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK BOGART, *Its Attorney-in-fact.*

Signed, sealed and delivered in presence of—

W. J. THOMSON,
Witness as to Frank Bogart.
I. T. WRIGHT,
Witness — William Mayger.

54 STATE OF MONTANA, } ss.
County of Lewis & Clarke, }

Before me, Ira T. Wright, a notary public, in and for the county and State aforesaid, appeared the St. Louis Mining and Milling Company of Montana, a corporation, by William Mayger, its manager, and William Mayger, personally, and acknowledged that said corporation and said William Mayger executed the foregoing bond as principals thereof; and that the United States Fidelity and Guaranty Company, a corporation, appeared before me by Frank Bogart, known to me to be its attorney in fact, and acknowledged that said corporation executed said bond, as surety thereof.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 25th day of February, 1903.

IRA T. WRIGHT,
Notary Public in and for the County of Lewis & Clarke, State of Montana.

55 *Power of Attorney Granted to George L. Ramsey and Frank Bogart by the United States Fidelity and Guaranty Company of Baltimore.*

Know all men by these presents, that the United States Fidelity and Guaranty Company, a body corporate duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint George L. Ramsey and Frank Bogart, of the city of Helena, county of Lewis and Clarke and State of Montana, to be its true and lawful attorneys, in and for the State of Montana, for the following purposes:

To sign its name as surety to, and to execute, acknowledge, justify upon, and deliver, any and all stipulations, bonds and undertakings, given or required in any judicial action or proceedings brought or pending within the said State.

It being the intention of this power of attorney, to fully authorize and empower the said George L. Ramsey and the said Frank Bogart, or either one of them, to sign the name of said company, and affix its corporate seal as surety to any or all of said stipulations, bonds and undertakings, and thereby to lawfully bind it as fully, and to all intents and purposes as if done by the duly authorized officers of said company, with the seal of said company thereto affixed, and the said company hereby ratifies and confirms all and whatsoever the said George L. Ramsey and the said Frank Bogart, or either one of them, may lawfully do in the premises by virtue of these presents.

In witness whereof, the said The United States Fidelity and Guaranty Company, pursuant to a resolution of its board of directors, duly passed on the 11th day of July, A. D. 1898 (a
56 certified copy of which is hereby annexed) has caused these presents to be sealed with its common and corporate seal

duly attested by its president and by its ass't secretary, this ninth day of March, A. D. 1900.

THE UNITED STATES FIDELITY AND GUARANTY CO.
[SEAL.] JOHN R. BLAND, *President.*
ARTHUR C. PIERCE,
Ass't Secretary.

(Government revenue 25c. stamp.)

STATE OF MARYLAND, *City of Baltimore,* } ss:

I, Edw. B. Ambler, a notary public, duly appointed and qualified, in and for the city and State aforesaid, hereby certify that on this ninth day of March, A. D., 1900, personally appeared before me, John R. Bland, president, and Arthur C. Pierce, ass't secretary, of the United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said corporation, and the individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of said corporation; and being by me each duly sworn severally and each for himself, did depose and say that they are the said officers of the said corporation, and that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said corporate seal, and their signatures as such officers, were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year above written.

[SEAL.] EDWARD B. AMBLER,
Notary Public.

57 *Copy of Resolution.*

That whereas, it is often necessary, in order to facilitate the business of the company in States other than Maryland, and in the Territories, to have stipulations, bonds and undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness;

Now therefore, be it resolved, that the president, or one of the vice-presidents, and the secretary, or assistant secretary, be, and they are hereby authorized, to appoint one or more persons residing in the States other than Maryland, and in the Territories of the United States, to sign the name of the company as surety to, and to execute, acknowledge, justify upon and deliver any and all stipulations, bonds and undertakings, given or required in any judicial action or proceeding within any one of the said States or Territories, and that

the said person or persons so appointed are hereby authorized and empowered to sign the name of the company, and to affix its corporate seal as surety to said stipulations, bonds and undertakings, and to sign their names thereto in attestation of same, and thereby to lawfully bind the company to all intents and purposes, as if done by its duly authorized officers, and the company, through us, its board of directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, Arthur C. Pierce, ass't secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a resolution passed by the board of directors of the said company at a regular meeting thereof, duly called and held on the 11th day of July, A. D. 1898, a quorum
58 being present, as the same appears on the records of the company now in my possession and custody as ass't secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of the said company, at the city of Baltimore, Maryland, this ninth day of March, A. D. 1900.

[SEAL.] ARTHUR C. PIERCE,
Ass't Secretary.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers, a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and foregoing is a full and correct copy of the power of attorney, granted by the United States Fidelity & Guaranty Company to George L. Ramsey, and Frank Bogart, under date of March 9th, A. D. 1900; together with certificate of authenticity, signed by Edward B. Ambler, notary public; copy of the resolution by the directors of the United States Fidelity and Guaranty Company, and certificate of authenticity, signed by Arthur C. Pierce, ass't secretary. I further certify that the power of attorney was filed in duplicate original, in the office of the clerk of the supreme court, State of Montana, and endorsed: "Filed March 16th, 1900. Henry G. Rickerts, clerk of the supreme court for the State of Montana;" and that it was filed in the office of the clerk of the United States court, for the district of Montana, and endorsed: "Filed and entered March 16th, 1900. Geo. W. Sproule, clerk of the U. S. district court, district of Montana."

If witness whereof, I have hereunto set my hand, and affixed my seal, in the city of Helena, Montana, this 25th day of February, 1903.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

59 *Certificates from the State Auditor, Secretary of State, and Clerk and Recorder of Lewis and Clarke County.*

No. 911.

Insurance License.

STATE OF MONTANA, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE.

Whereas, the United States Fidelity and Guaranty Company, organized under and pursuant to the laws of Maryland, located and having its principal place of business at Baltimore, has in all respects complied with the requirements of the laws of the State of Montana, governing insurance companies transacting business therein, and has paid to said State all fees and charges, which by said laws are required to be paid.

Now therefore, I, J. H. Calderhead, auditor of the State of Montana, by virtue of the authority in me vested by law, do hereby authorize, empower and license the aforesaid insurance company to collect through duly appointed agents, in the State of Montana, insurance premiums amounting to $5,000.00, in accordance with the laws thereof. This license expires on the 31st day of March, 1902, unless sooner revoked by competent authority of the State.

In witness whereof, I have hereunto set my name and affixed my official seal, at the said capital, at the city of Helena, the 1st day of April, A. D. 1901.

[SEAL.] J. H. CALDERHEAD,
State Auditor.

60 No. 2071.

Agent's License.

STATE OF MONTANA, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE.

Whereas, the United States Fidelity and Guaranty Company, located at Baltimore, Md., having fully complied with the requirements of the laws of the State of Montana, and a license issued to said company authorizing and empowering said company to transact through its duly appointed agents, the business of surety insurance in the State of Montana, in accordance with the laws thereof, until revoked by competent authority of the State.

Now, therefore, it is hereby certified, that George L. Ramsey, of Helena, Lewis and Clarke county, State of Montana, having been appointed by the proper officers of said company, are hereby authorized to transact business according to law for said company, so far

as he may be legally empowered by said company, until the thirty-first day of March, 1902, unless this license is sooner revoked.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, at the State capital, at the city of Helena, this 1st day of April, 1901.

[SEAL.] J. H. CALDERHEAD,
State Auditor.

61 OFFICE OF SECRETARY OF STATE.

UNITED STATES OF AMERICA, *State of Montana*, } ss:

I, Geo. M. Hays, secretary of *the* state of the State of Montana, do hereby certify that the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, did, on the twelfth day of September, A. D. 1899, file a certified copy of its charter, an appointment and acceptance of agent, and a financial statement; also that said company did, on the sixth day of February, A. D. 1901, file in this office, a copy of its financial statement, as of December 31st, A. D. 1900, all, in compliance with section 1030–1038 of the Civil Code of the State of Montana; and I do further certify that said company, having complied with the laws relating to foreign corporations, is entitled to transact business in the State of Montana.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Montana, this the second day of April, A. D. 1901.

[SEAL.] GEO. M. HAYS,
Secretary of State.

(10c. revenue stamp.)

62 Office of the county clerk and recorder for the county of Lewis and Clarke, State of Montana.

STATE OF MONTANA, *County of Lewis and Clarke*, } ss:

I, Sidney Miller, county clerk and recorder of Lewis and Clarke county, State of Montana, do hereby certify that the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, did, on the second day of April, A. D. 1900, file a certify- copy of its charter, a financial statement, and an appointment and acceptance of agent, (this latter, being dated the 12th day of September, 1899) also that said company did, on the sixth day of February, A. D. 1901, file in this office, a copy of its financial statement, as of December 31st, A. D. 1900, all, in compliance with sections 1030–1038 of the Civil Code of the State of Montana; and I do further certify that said company, having complied with the laws relating to foreign corporations, is as

regards this office, duly entitled to transact business in compliance with the Statutes of the State of Montana.

In testimony whereof, I have hereunto set my hand and affixed the seal of the county of Lewis and Clarke, State of Montana, this second day of April, A. D. 1901.

[SEAL.] SIDNEY MILLER,
County Clerk and Recorder.

(10c. revenue stamp.)

63 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I, Joseph W. Chivers a notary public in and for the county of Lewis and Clarke, State of Montana, do hereby certify that the above and preceding four recitals are full and correct copies of the certificates of authority granted in the State of Montana to the United States Fidelity and Guaranty Company, of Baltimore, Maryland, under the dates set forth therein, respectively.

In witness whereof, I have hereunto set my hand and affixed my seal, at the city of Helena, Montana, this 25th day of February, 1903.

[SEAL.] JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

(Endorsed:) Bond on appeal. Form of bond and sufficiency of surety approved March 2, 1903. Wm. B. Gilbert, circuit judge. Filed March 2, 1903, F. D. Monckton, clerk.

64 United States Circuit Court of Appeals for the Ninth Circuit.

THE ST. LOUIS MINING AND MILLING COMPANY OF Montana and William Mayger, Appellants, } No. 714.
v.
THE MONTANA MINING COMPANY, LIMITED, Appellee. }

Certificate of Clerk C. C. A. to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-three (63) pages, numbered from one (1) to sixty-three (63), inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above entitled case as the same appear of record in my office, and that the same, together, constitute the transcript of record herein upon appeal to the Supreme Court of the United States.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 17th day of March, A. D. 1903.

F. D. MONCKTON, *Clerk.*

65 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Montana Mining Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within sixty (60) days from the date hereof, pursuant to an order allowing an appeal, of record in the office of the clerk of the United States circuit court of appeals for the ninth circuit in that certain cause wherein The St. Louis Mining and Milling Company of Montana and William Mayger are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, senior United States circuit judge for the ninth circuit, this 2d day of March, A. D. 1903.

WM. B. GILBERT,
Senior United States Circuit Judge.

Due and timely service of the above citation is hereby admitted this 7th day of March 1903, and acknowledge receipt of copy thereof at the same time.

CULLEN, DAY & CULLEN,
Attorneys for the Montana Mining Company, Ltd.

66 [Endorsed:] No. 714. United States circuit court of appeals for the ninth circuit. St. Louis Mining and Milling Co. of Montana, and William Mayger *vs.* The Montana Mining Company, Limited. Citation. Filed March 11, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Endorsed on cover: File No. 18,882. U. S. circuit court of appeals, ninth circuit. Term No. 250. The St. Louis Mining and Milling Company of Montana and William Mayger, appellants, *vs.* The Montana Mining Company, Limited. Filed April 4, 1903. File No. 18,882.